Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

No. 95-975

In The

Supreme Court of the United States

October Term, 1995

THOMAS A. BISKUP,

Petitioner,

v.

GARY McCAUGHTRY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General
of Wisconsin

DAVID J. BECKER
(Counsel of Record)
Assistant Attorney General
of Wisconsin
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-7447

Counsel for Respondent

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ARGUMENT WHY PETITION FOR CERTIORARI SHOULD BE DENIED 2

I. This Court Should Not Grant Review Of The Issue Regarding The Admission Of The Hypnotically Refreshed Testimony Because: (1) The Petitioner Has Forfeited His Right To Review Of His Constitutional Claim By His Failure To Present It To The State Courts; (2) The Petitioner Has Not Shown A Split In The Circuits On The Constitutional Issue He Raises. 2

A. The petitioner has forfeited his right to raise, in this federal habeas corpus proceeding, his contention that the admission of the hypnotically refreshed testimony violated his constitutional rights because that contention was never presented to the state courts. 2

B. The petitioner has not shown a split in the circuits on the constitutional issue he raises. 5

II. This Court Should Not Grant Review Of The Issue Regarding The Sufficiency Of The Evidence To Support The Petitioner's Conviction Because: (1) It Simply Presents A Mine-Run Question Of Evidentiary Sufficiency That In No Way Implicates This Court's Function As Law Developer And

Page

Harmonizer; (2) The Petitioner's Argument With Respect To It Is Patently Without Substance. 8

A. The sufficiency-of-the-evidence-to-convict issue that the petitioner raises simply presents a mine-run question that in no way implicates this Court's function as law developer and harmonizer. 8

B. The petitioner's argument with respect to the sufficiency-of-the-evidence issue is patently without substance. 9

III. This Court Should Not Grant Review Of The Severance Issue Because: (1) Review Of It Would In No Way Implicate This Court's Function As Law Developer And Harmonizer; (2) The Petitioner's Argument With Respect To It Is Patently Without Substance. 11

A. The severance issue in no way implicates this Court's function as law developer and harmonizer. 11

B. The petitioner's argument with respect to the severance issue is patently without substance. 12

IV. This Court Should Not Grant Review Of The Issue Of Prosecutorial Delay In Charging Because: (1) Review Of It Would In No Way Implicate This Court's Function As Law Developer And Harmonizer; (2) The

Page

Petitioner's Argument With Respect To It Is Patently Without Substance. 13

A. The delay-in-charging issue in no way implicates this Court's function as law developer and harmonizer. 13

B. The petitioner's argument with respect to prosecutorial delay is patently without substance. 14

CONCLUSION 17

CASES CITED

Jackson v. Virginia,
443 U.S. 307 (1979) 9

Leach v. Kolb,
911 F.2d 1249 (7th Cir. 1990) 12

Neil v. Biggers,
409 U.S. 188 (1972) 7

Peters v. State,
70 Wis. 2d 22,
233 N.W.2d 420 (1975) 12, 13

State v. Bettinger,
100 Wis. 2d 691,
303 N.W.2d 585 (1981) 12, 13

State v. Weso,
60 Wis. 2d 404,
210 N.W.2d 442 (1973) 10-11

Page

Teague v. Lane,
489 U.S. 288 (1989) 4

Tuttle v. Utah,
57 F.3d 879 (10th Cir. 1995) 6, 7, 8

United States v. Gouveia,
467 U.S. 180 (1984) 13, 14

United States v. Lane,
474 U.S. 438 (1986) 12

United States v. Lovasco,
431 U.S. 783 (1977) 13, 15

United States v. Marion,
404 U.S. 307 (1971) 13, 16

United States v. Powell,
469 U.S. 57 (1984) 10

United States v. Rogers,
475 F.2d 821 (7th Cir. 1973) 12

United States v. Valdez,
722 F.2d 1196 (5th Cir. 1984) 5, 6, 8

Wickstrom v. Schardt,
798 F.2d 268 (7th Cir. 1986) 3, 4

Williams v. Armontrout,
877 F.2d 1376 (8th Cir. 1989) 6, 7, 8

Page

STATUTES CITED

United States Statutes

28 U.S.C. § 2254(d) 16

Wisconsin Statutes

Sec. 940.23 (1983) 10

OTHER AUTHORITIES

Wis. JI-Criminal 1110 (1966) 11

No. 95-975

In The

Supreme Court of the United States

October Term, 1995

THOMAS A. BISKUP,

Petitioner,

v.

GARY McCAUGHTRY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts material to consideration of the questions presented that are not set out in the petitioner's statement of the case will be stated as they become relevant in the following argument.

ARGUMENT WHY PETITION FOR CERTIORARI SHOULD BE DENIED

I. This Court Should Not Grant Review Of The Issue Regarding The Admission Of The Hypnotically Refreshed Testimony Because: (1) The Petitioner Has Forfeited His Right To Review Of His Constitutional Claim By His Failure To Present It To The State Courts; (2) The Petitioner Has Not Shown A Split In The Circuits On The Constitutional Issue He Raises.

A. The petitioner has forfeited his right to raise, in this federal habeas corpus proceeding, his contention that the admission of the hypnotically refreshed testimony violated his constitutional rights because that contention was never presented to the state courts.

While the petitioner raised an objection to the admission of the hypnotically refreshed testimony in the state courts, a reading of his pretrial motion seeking exclusion of the evidence (Motion in Limine to Suppress Hypnotically Affected Testimony and Memorandum in Support, Exhibit A in appendix to respondent's brief in opposition to petition for writ of habeas corpus filed in the district court), his oral argument at the hearing held on that motion (Motion hearing tr., March 14, 1989, at 75-85), his posttrial motion seeking a new trial because the testimony was admitted (Motion for New Trial Based Upon Improper Admission of Hypnotically Affected Testimony and Memorandum in Support, Exhibit B in appendix to respondent's brief in opposition to petition for

writ of habeas corpus filed in the district court), his oral argument at the hearing held on that motion (Motion hearing tr., April 19, 1989, at 11-14, 16-17), and his argument regarding the hypnotically refreshed testimony in his brief in the Wisconsin Court of Appeals (petitioner's brief to Wisconsin Court of Appeals, Exhibit C to Answer to Petition For Writ of Habeas Corpus, at 18-27), reveals that he never raised the **federal constitutional** issue he presents to this Court. In all of his state court submissions, the matter was presented purely as a question of **state evidentiary** law.[1]

---

[1]In its answer to the petitioner's petition for a writ of habeas corpus, the respondent, in addressing a question distinct from the waiver issue addressed above--i.e., whether there had been exhaustion of state remedies in this case--stated that the "petitioner has previously presented all of the grounds for relief he raises in his petition in this court to the state trial court (which denied them all on the merits), the state court of appeals (which denied them all on the merits), and the state supreme court (which denied review of them). He has, therefore, exhausted his state remedies" (Answer at 3, para. 11). As shown in the paragraph to which this footnote is appended, that assertion was not entirely factually accurate. While the broad issue of the admissibility of the hypnotically refreshed testimony was raised, and raised repeatedly, in the state courts, the specific constitutional claim raised in this federal habeas corpus proceeding was not. In state court, the petitioner never contended that he was denied his constitutional rights when the hypnotically refreshed testimony was admitted. The factual error in the answer did not, however, render invalid the respondent's ultimate legal concession that the petitioner had exhausted his state remedies. "[A]ll claims waived by failing to preserve them in state court are exhausted . . . ." *Wickstrom v. Schardt*, 798 F.2d 268, 270 (7th Cir. 1986). This inaccuracy in the respondent's answer to the habeas corpus petition was called to the district court's attention before it decided this case (*see* respondent's brief in federal district court at 9-10 n.5).

By failing to present the constitutional issue to the state courts, he waived his right to raise it in those courts:

> Wisconsin permits review on appeal of all issues preserved at trial but deems waived all other issues. *Neely v. State*, 97 Wis.2d 38, 292 N.W.2d 859, 869 (1980); *Macklin v. State*, 92 Wis.2d 323, 284 N.W.2d 661 (1979); *Barrera v. Young*, *supra* at 1268. Objections must be made with sufficient particularity or the issue will be deemed waived. *Roach v. Keane*, 73 Wis.2d 524, 243 N.W.2d 508, 515 (1974).

Wickstrom v. Schardt, 798 F.2d 268, 270 (7th Cir. 1986).

The effect of that waiver on this federal habeas corpus proceeding was described by this Court in *Teague v. Lane*, 489 U.S. 288, 297-98 (1989):

> Petitioner candidly admits that he did not raise the *Swain* claim at trial or on direct appeal. Brief for Petitioner 38-39. Because of this failure, petitioner has forfeited review of the claim in the Illinois courts. . . .
>
> . . . .
>
> Under *Wainwright v. Sykes*, 433 U.S. 72, 87-91, 97 S.Ct. 2497, 2506-2509, 53 L.Ed.2d 594 (1977), petitioner is barred from raising the *Swain* claim in a federal habeas corpus proceeding unless he can show cause for the default and prejudice resulting therefrom. See *Engle v. Isaac*, *supra*, 456 U.S., at 113-114, 117, 124-135, 102 S.Ct., at 1564-1565, 1566, 1570-1576 (applying procedural default rule to claim that had never been raised in state court).

Here, the petitioner has not shown, and the respondent does not believe he could show, either cause for the

default or prejudice resulting from it. Therefore, he is barred from raising in this federal habeas corpus proceeding the constitutional issue he does regarding the admission of the hypnotically refreshed testimony.[2]

B. The petitioner has not shown a split in the circuits on the constitutional issue he raises.

The petitioner offers a single reason why this Court should grant review of the issue he raises regarding the admission of the hypnotically refreshed testimony in this case: he asserts that there is "a split in the circuits regarding the criteria for admissibility of hypnotically induced or refreshed testimony" (petition for writ of certiorari at 6; capitalization and underlining deleted). To support that assertion, the petitioner relies primarily on an alleged conflict between the decision of the Seventh Circuit Court of Appeals in this case and the decision of the Fifth Circuit Court of Appeals in *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984).

No conflict exists between the decision in this case and the decision in *Valdez* because the two cases deal with materially distinct issues. In this federal habeas corpus proceeding reviewing a state-court judgment of conviction, the court below was confronted with the question whether the admission of the hypnotically refreshed testimony

---

[2]Precisely the same argument as that made above was presented to the federal district court and the federal court of appeals in this case (*see* respondent's brief in district court at 9-11; respondent's brief in court of appeals at 16-18). The district court dismissed it in one sentence: "This court is not persuaded by the state's argument" (decision of district court at 2 n.2; Pet-App. at A-53). The court of appeals did not address the argument.

violated **the petitioner's constitutional rights**. In *Valdez*, which involved a direct appeal from a federal-court judgment of conviction, the court was dealing with the question whether the admission of the hypnotically refreshed testimony at issue violated **the federal rules of evidence**.

In *Valdez*, the court found that the testimony should have been excluded by application of the rules of evidence, in particular, the rule that permits the exclusion of relevant evidence when its probative value is outweighed by the dangers of unfair prejudice, jury confusion, or jury misapprehension. 722 F.2d at 1201. And the *Valdez* court unequivocally recognized that the evidentiary issue it decided is separate and distinct from the constitutional issue presented here when it expressly "assume[d] that the [evidentiary] error [it found] did *not* violate Valdez's constitutional rights." 722 F.2d at 1204 (emphasis supplied).

In this habeas corpus proceeding, the court of appeals applied constitutional principles to determine that no violation of the federal constitution occurred when the hypnotically refreshed testimony was admitted. The court of appeals' decision in this case is thus not in conflict with *Valdez*, which found the hypnotically refreshed testimony at issue in that case inadmissible under the rules of evidence and expressly declined to find any constitutional violation in its admission.

The petitioner suggests that the decision in the present case is "also at odds" with the decisions in *Williams v. Armontrout*, 877 F.2d 1376 (8th Cir. 1989), and *Tuttle v. Utah*, 57 F.3d 879 (10th Cir. 1995) (petition for writ of certiorari at 10). That, too, is not accurate.

Williams involved an in-court identification that was alleged to have been the product of an impermissibly

suggestive identification procedure conducted by the police. The identification had been produced after the witness had been hypnotized by a police officer. The case was decided under the well-accepted standards set down by this Court for determining when an identification procedure is impermissibly suggestive and should result in the suppression of an in-court identification resulting from it. 877 F.2d at 1379-80, citing *Neil v. Biggers*, 409 U.S. 188 (1972).

The present case is materially distinguishable in at least two respects. First, no identification procedure is involved. Second, as the court of appeals pointed out in its decision in this case, the witness

> independently decided to undergo hypnosis in an effort to recall more clearly the events surrounding the accident. There is no evidence that that decision was prosecutorially induced.

Biskup v. McCaughtry, 20 F.3d 245, 251 (7th Cir. 1994) (Pet-App. at A-29 to A-30).

Thus, the standards that govern the admissibility of identifications resulting from impermissibly suggestive police procedures, upon which the court relied in *Williams*, are not applicable here. Consequently, there can be no conflict between this case and *Williams*.

There is even less substance to any claim that this case is in conflict with *Tuttle*, for the court in *Tuttle* expressly refrained from determining whether the hypnotically enhanced testimony at issue was admitted in violation of the defendant's constitutional rights. Rather, it simply "assume[d]" that constitutional error occurred, as a prelude to disposing of the case on the ground that, if constitutional error occurred, it was harmless. 57 F.3d at 883, 892.

In sum, the petitioner has not shown that the Seventh Circuit Court of Appeals' decision in this case is in conflict with any decision in other circuits. And, apart from the alleged conflict with *Valdez*, *Williams*, and *Tuttle*, the petitioner has made no other argument supporting his request for review. In particular, he makes no claim that the constitutional principles applied by the court of appeals in this case were somehow inconsistent with the decisions of this Court.

Since the alleged conflict that is the only ground upon which the petitioner predicates his request for review has been shown not to exist, it follows that review of this issue should be denied.

II. This Court Should Not Grant Review Of The Issue Regarding The Sufficiency Of The Evidence To Support The Petitioner's Conviction Because: (1) It Simply Presents A Mine-Run Question Of Evidentiary Sufficiency That In No Way Implicates This Court's Function As Law Developer And Harmonizer; (2) The Petitioner's Argument With Respect To It Is Patently Without Substance.

A. The sufficiency-of-the-evidence-to-convict issue that the petitioner raises simply presents a mine-run question that in no way implicates this Court's function as law developer and harmonizer.

As the "Considerations Governing Review on Certiorari" set out in Rule 10 of this Court's rules make manifest, this Court views its primary function as

developing, harmonizing, and assuring consistent application of the law on important federal questions. Review of the issue of the sufficiency of the evidence to support the petitioner's conviction would in no way implicate that function. The constitutional requirement that the evidence must be sufficient to convict, and the standards governing determination of the sufficiency of the evidence to support a conviction, are fully set out in this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). The only question here is the entirely fact-bound inquiry into whether the specific evidence adduced in this case was sufficient under those standards.

The court of appeals, expressly invoking and applying *Jackson*, concluded that the evidence was sufficient to convict. Review of that fact-specific conclusion would in no way promote the development, harmonization, and consistent application of the law on important constitutional questions. Review of this issue should, therefore, be denied.

B. The petitioner's argument with respect to the sufficiency-of-the-evidence issue is patently without substance.

The petitioner has never denied that the evidence in this case was sufficient to establish, beyond a reasonable doubt, the following facts. The petitioner entered into a conspiracy with his accomplice Kolz by which he asked Kolz to "hit" the victim (the petitioner's wife) with his (Kolz's) 1975 Monte Carlo automobile (Trial tr., Day 2, at 5, 6). As Kolz testified, the petitioner "told me that what he would do is, he would take Suzanne [the victim] into town to have dinner, and then on the way back out of town, I was supposed to hit her with the car" (*id.* at 12). Kolz testified that he was supposed to "just basically nick

her or scare her" (*id.* at 50). In accord with the plan, the petitioner arranged to have the victim walking alongside of the highway, and Kolz, traveling at forty to forty-five miles per hour (*id.* at 19), struck the victim with his car and threw her approximately seventy-four feet (*id.* at 67), resulting in her being paralyzed from the chest down (Trial tr., Day 1, at 144).

The petitioner challenges his conviction of one of the crimes with which he was charged and convicted: injury by conduct regardless of life. Under Wisconsin law, that crime requires that a defendant have engaged in conduct that "evince[d] a depraved mind, regardless of human life." Sec. 940.23, Wis. Stats. (1983). In his petition, the petitioner's challenge to the sufficiency of the evidence is predicated exclusively on the fact that the jury in this case acquitted him of aggravated battery (another crime with which he was charged), thereby implicitly finding that he did not intend to cause great bodily harm. He asserts that "[i]t is impossible to reconcile the jury's finding that the petitioner did not intend to cause great bodily harm to his wife with a finding that his conduct" evinced a depraved mind regardless of life (petition for writ of certiorari at 13).

The short answer to the petitioner's argument is that consistency between verdicts is not required. *See United States v. Powell*, 469 U.S. 57, 58-69 (1984).

The longer answer to the petitioner's argument is that there is no inconsistency between the jury's implicitly finding a lack of intent to cause great bodily harm and its finding the existence of the "depraved mind" element of injury by conduct regardless of life. The Wisconsin Supreme Court has explicitly stated that a "depraved mind has a general intent to do the acts and the consciousness of the nature of the acts and possible result but lacks the

specific intent to do the harm." *State v. Weso*, 60 Wis. 2d 404, 411-12, 210 N.W.2d 442, 446 (1973). Obviously, no intent to do any harm at all, much less an intent to do great bodily harm, is necessary to establish the "depraved mind" element of the offense in question. Even absent the specific intent to cause great bodily harm, the petitioner and Kolz evinced that "utter lack of concern for the life and safety of another" that is the hallmark of a "depraved mind," *see* Wis. JI-Criminal 1110 (1966), when Kolz, driving his 1975 Monte Carlo at a speed of forty to forty-five miles per hour, deliberately struck the victim as the petitioner had directed him to do.

III. This Court Should Not Grant Review Of The Severance Issue Because: (1) Review Of It Would In No Way Implicate This Court's Function As Law Developer And Harmonizer; (2) The Petitioner's Argument With Respect To It Is Patently Without Substance.

A. The severance issue in no way implicates this Court's function as law developer and harmonizer.

As with the previous issue, review of this issue would in no way implicate this Court's function to develop, harmonize, and render consistent the law on important federal questions. It would again require a fact-specific inquiry that would not contribute to the development of the law. For that reason, review of this issue should be denied.

B. The petitioner's argument with respect to the severance issue is patently without substance.

The petitioner contends that he was deprived of due process and a fair trial because the burglary counts with which he was charged were tried together with the injury counts with which he was charged. The Constitution is violated if the trial of joined charges "'results in prejudice so great as to deny a defendant his . . . right to a fair trial.'" *Leach v. Kolb*, 911 F.2d 1249, 1258 (7th Cir. 1990), quoting *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986). Such prejudice, however, cannot be found to exist when evidence of the joined counts would be admissible in separate trials of each of them:

> [P]rejudice requiring severance is not shown if evidence on the severed count would be admissible in the trial of the remaining counts, Drew v. United States, 118 U.S.App.D.C. 11, 331 F.2d 85, 91 (1964).

United States v. Rogers, 475 F.2d 821, 828 (7th Cir. 1973).

Here, the petitioner's argument proceeds from a faulty premise: that "[t]he evidence of burglary charges against the petitioner would not have been admitted separately at the trial of the physical injury to the petitioner's wife" (petition for writ of certiorari at 14). Contrary to the petitioner's assertion, evidence of the burglary counts would have been admissible at a trial of the injury counts because the fact that his wife had threatened to turn him in on the burglaries provided one of the potential motives for the petitioner's commission of the injury crimes against her. *See State v. Bettinger*, 100 Wis. 2d 691, 698, 303 N.W.2d 585, 588 (1981); *Peters v. State*, 70 Wis. 2d 22, 30, 233 N.W.2d 420, 425 (1975). Moreover, evidence of the

injury counts would have been admissible at a trial on the burglary counts because the injury crimes evinced a consciousness of guilt on the part of the petitioner in regard to the burglary counts. *See State v. Bettinger*, 100 Wis. 2d at 698, 303 N.W.2d at 588-89; *Peters v. State*, 70 Wis. 2d at 30, 233 N.W.2d at 425.

Thus, under the general rule that there is not sufficient prejudice to a criminal defendant to warrant severance when evidence of each crime would be admissible at a separate trial for the other, there is no basis for finding that severance was required here.

IV. This Court Should Not Grant Review Of The Issue Of Prosecutorial Delay In Charging Because: (1) Review Of It Would In No Way Implicate This Court's Function As Law Developer And Harmonizer; (2) The Petitioner's Argument With Respect To It Is Patently Without Substance.

A. The delay-in-charging issue in no way implicates this Court's function as law developer and harmonizer.

As with the two previous issues, review of this issue would in no way implicate this Court's function to develop, harmonize, and render consistent the law on important federal questions. The law regarding prosecutorial delay in charging is well developed. *See United States v. Gouveia*, 467 U.S. 180 (1984); *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971). Again, what would be required if review were granted here is a wholly fact-bound inquiry that

would not contribute to the development of the law in any substantial way. For that reason, review of this issue should be denied.

B. The petitioner's argument with respect to prosecutorial delay is patently without substance.

This Court has stated that due process is violated if a defendant can prove that the Government's delay in bringing the indictment was "a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." *United States v. Gouveia*, 467 U.S. at 192. The petitioner has not established either an intent to gain tactical advantage or actual prejudice.

Intent To Gain Tactical Advantage. The petitioner's contention that the delay in this case was deliberately designed to gain a tactical advantage over him is based on the testimony of Detective Ladwig that, as of the summer of 1985, there was a "prosecutable case" against the petitioner with respect to the burglaries with which he was ultimately charged (Motion to Dismiss Pre-Arrest Delay and Prosecutorial Delay and Affidavit in Support, Exhibit C in appendix to respondent's brief in opposition to petition for writ of habeas corpus filed in district court, at 6-10), but that he "wasn't really pushing" the burglary cases (*id.* at 8) because of the tactical advantages in putting them together with the injury charges (*id.* at 9-10).

The district attorney disputed Ladwig's assertion that a prosecutable case had been put together by the summer of 1985 (Motion hearing tr., May 12, 1989, at 53). The respondent, however, does not believe it is necessary to resolve that dispute. Even assuming that the burglary

charges could have been prosecuted in the summer of 1985, the state's delay in bringing those charges until it could put together its whole case against the petitioner, including the injury counts, did not constitute an improper attempt to "gain a tactical advantage over the petitioner," in the sense that such phrase is used to describe the showing necessary to make out a due process violation.

That is clear from this Court's decision in *United States v. Lovasco*. In *Lovasco*, this Court expressly rejected the notion that

> once the Government has assembled sufficient evidence to prove guilt beyond a reasonable doubt, it should be constitutionally required to file charges promptly, even if its investigation of the entire criminal transaction is not complete.

431 U.S. at 792. This Court recognized that

> compelling a prosecutor to file public charges as soon as the requisite proof has been developed against one participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act.

431 U.S. at 792-93. Among the problems "would be multiple trials involving a single set of facts." 431 U.S. at 793. Under *Lovasco*, the prosecutor in the instant case could certainly delay prosecution of the burglary counts until he was ready to try them together with the injury counts at a single trial. The delay in prosecuting the burglary counts in question was not designed to gain an improper tactical advantage over the petitioner, but rather to permit the state to put its best case together on all of the counts and try them in one trial.

Actual Prejudice. The petitioner alleges that he suffered prejudice because: (1) "potential witnesses had died" and (2) "certain calendars (for an alibi defense) had been lost in the years since the burglaries (1982 and 1983)" (petition for writ of certiorari at 17).

The first allegation is inadequate in light of the following observation of this Court in *United States v. Marion*, 404 U.S. at 325-26:

> Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment.

The second allegation of prejudice has been completely undermined by the state trial court's finding, made as part of its postconviction decision on the petitioner's motion to dismiss for delay in the commencement of the prosecution, that the petitioner's testimony regarding the family calendars and what they would have shown was "basically not credible" (Memorandum Decision on Defendant's Motion to Dismiss for Delay in Prosecution, Exhibit I to Answer to Petition for Writ of Habeas Corpus, at 4). That is a finding of fact that is entitled to a presumption of correctness under 28 U.S.C. § 2254(d).

In short, the petitioner has shown neither improper prosecutorial motive nor actual prejudice. Therefore, no due process violation has been established.

CONCLUSION

For the foregoing reasons, the respondent requests this Court to deny the petitioner's petition for writ of certiorari.

Respectfully submitted,

JAMES E. DOYLE
Attorney General
of Wisconsin

DAVID J. BECKER
(Counsel of Record)
Assistant Attorney General
of Wisconsin
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-7447

Counsel for Respondent